

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: A10 / 2024

In the matter between

ONAGHAN INVESTMENTS NO .15 (PTY) LTD

Appellant

(Applicanta quo)

and

ADVOCATE M.S. BANDERKER

Respondent

(Respondent a quo)

Coram: Wille et Thulare, JJ

(Determined on the papers by agreement)

Delivered: 27 March 2024

JUDGMENT

THE COURT:

Introduction

[1] This is an appeal from the lower court at the instance of the applicant a *quo*. We will refer to the parties as they were cited in the lower court. This is for clarity and a better understanding of why the relief was not granted in the lower court to benefit the applicant.¹

¹ The lower court refused a judgment regarding an "Unconditional Undertaking to Pay Including a Consent to Judgment".

[2] The court of first instance initially made the document styled an '*Unconditional Undertaking to Pay Including a Consent to Judgment*' a court order. We say so correctly. This is not disputed. This document was undoubtedly an undertaking by the respondent to comply with his lease payment obligations with the applicant regarding the offices from which he conducted his business.²

[3] The respondent then needed to comply with the terms and conditions of his undertaking. This he did not do. After that, the applicant piloted an application for a judgment to be recorded against the respondent regarding the court rules applicable in the lower courts.³

[4] The judicial officer in the court of first instance dismissed the judgment application because he held the view that he lacked the necessary jurisdiction to grant a judgment against the respondent. He believed that the undertaking, as styled, was not a settlement agreement, and thus, he could not enter a judgment on the undertaking in favour of the applicant against the respondent.⁴

[5] This appeal turns on a very narrow issue. This issue is whether the judicial officer in the lower court erred by not granting judgment to the applicant's benefit by failing to apply the correct principles of interpretation. More specifically, the issue is whether the judicial officer had adequate regard for the ordinary wording of the rules and the proper context of these rules. This bears in mind that the undertaking had already been made a court order by the court. The context is that another judicial officer had made the undertaking an order of the court, and thus, the issue of settlement was no longer a live issue when a request was made for the entry of a judgment.⁵

Factual context

[6] More than two years ago, the applicant instituted action against the respondent for arrear rental regarding his business premises. The respondent defended the action. The respondent failed to file his plea timeously, and the requisite procedural

² The chambers of the respondent. "Chamber 514, Fifth Floor, Huguenot Chambers, 40 Victoria Street, Cape Town".

³ An application was made following the provisions of rule 27(9) ("the Rule 27(9) Application").

⁴ The judicial officer was of the view that the undertaking did not comply with the wording set out in rule 29(9).

⁵ The undertaking had already been made an order of court by a different judicial officer.

notice was served to his attorneys. Still, no plea was filed, and the respondent was *ipso facto* procedurally barred from filing his plea following the court rules.⁶

[7] The respondent then elected to settle his dispute with the applicant. He signed an undertaking which provided, among other things as follows: [sic]

*'...The provisions of this agreement can be made an Order of Court by way of Application in terms of the provisions of Rule 27 of the Magistrate Court Rules, and to this end, I waive notice and service of any such application. I further acknowledge and understand that in the event of any breach of this agreement, the Landlord shall be entitled to levy execution in accordance with the notice of this agreement as an order of court ...'*⁷

[8] After the conclusion of this agreement and written undertaking, the applicant brought an application to record the undertaking as an order of the court. This was successful, and the court recorded the undertaking as an order of the court.⁸

[9] The respondent should have made payment in terms of the undertaking but did not do so. The applicant accordingly chartered an application for judgment against the respondent. The respondent opposed this application and delivered an affidavit opposing the judgment application, and after that, the applicant filed a reply. The respondent requested a postponement on the day of the judgment hearing to furnish an undertaking to pay R300,000.00 to the applicant. This payment was subject to the transfer of an immovable property. The appellant obliged the respondent's request for this indulgence because the applicant was placed in possession of a letter from a firm of legal practitioners who purported to furnish a guarantee for payment of R300,000.00 to the applicant against transferring a specific immovable property. This sum was a surplus amount earmarked for the applicant. This payment was not made, and eventually, after more than two months, the respondent only paid R50,000.00 as a partial payment towards his agreed indebtedness to the applicant.⁹

Consideration

⁶ The then respondent's attorneys of record then withdrew as his attorneys of record.

⁷ Of significance were the provisions of clause 2.9 which are referenced above.

⁸ Magistrate Khan made the undertaking an order of court under rule 27(6) on 23 March 2021.

⁹ This payment was made on 31 May 2023.

[10] The entitlement to judgment following the rules contemplates two essential requirements: (a) there must be an extant order providing for the debtor to fulfil an obligation, and (b) the debtor must have breached that obligation. The applicant contends it squarely met both requirements.¹⁰

[11] It was not disputed that the respondent breached the terms of the extant order by failing to pay his rental obligations that fell due. The only possible avenue of escape for the respondent was his somewhat belated argument about the applicant's misrepresentation as to the extent of the respondent's indebtedness. Significantly, the respondent did not squarely dispute his indebtedness.¹¹

[12] The appellant re-enrolled the judgment application for hearing because the respondent failed to make full payment or furnish any details about the alleged property transfer. The judicial officer dismissed the application for judgment, and the respondent remains in occupation of the leased business premises.¹²

[13] The applicable rules that bear scrutiny are indicated as follows:

'...(6) - (a)...before judgment to record the terms of any settlement agreed to by the parties to a proceeding without entry of judgment....if the terms of settlement so provide, the court may make such settlement an order of court...'

*'...(9) - (a)...terms of a settlement agreement which was recorded in terms of subrule (6) provide for the future fulfilment by any party of stated conditions and such conditions have not been complied with by the party concerned, the other party may at any time on notice to all interested parties apply for the entry of judgment in terms of the settlement...'*¹³

[14] For this interpretative process, we are enjoined to begin by employing the principles applicable to the general interpretation of rules and the words that make up these rules. It is now well-established that the process of interpretation is not simply objective but is a unitary process in which one must take account of both textual and extra-textual aspects.¹⁴

¹⁰ An order of the court was in place and the respondent was in breach of the terms of the existing order.

¹¹ This argument is complex to understand as the respondent is an experienced legal practitioner.

¹² This occupation is in the absence of the agreed rental payments.

¹³ The portions of rule 27(6) and rule 27(9) of the rules regulating the conduct of proceedings in the Magistrates' Courts.

¹⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), at para 18.

[15] The respondent did not dispute that his undertaking could be made an order of the court. His contentions were limited to the averment that he was allegedly misled as to the extent of his indebtedness. Thus, the refusal to grant a judgment notwithstanding the extant court order (and the undisputed breach thereof) was an issue that did not arise on the merits of what was required to be adjudicated before the judicial officer in the lower court.¹⁵

[16] Put another way, parties to a dispute must define the issues in their pleadings, and the court must adjudicate those issues in dispute. The judicial officer in the lower court raised an irrelevant issue because it was common cause that the undertaking had already been made an order of the court. The adjudication differed from whether the undertaking constituted a settlement agreement, as the order application had already definitively determined this issue.¹⁶

[17] The only alive issue of any merit before the judicial officer in the lower court judgment application was whether the respondent had breached the terms of the undertaking (which was made an order of the court), thus entitling the applicant to judgment. In our view, the court of first instance materially misdirected itself by traversing an issue that needed to be raised in the pleadings and relevant to the issue before the judicial officer for the adjudication of the judgment application.¹⁷

[18] The contextual wording must also inform us regarding interpreting the relevant rules for withdrawal, dismissal, and settlement of matters in the lower courts. The rule does not refer to a settlement agreement. By contrast, it refers to recording the terms of any settlement that a court may issue through an order. The significance of this is that the focus is on the terms of the document in question. After all, it is only after considering the terms of the agreement reached between the parties that a judicial officer can determine whether a matter has been settled. The style and formulation of the agreement are less critical. More important are the terms of the agreement. What carries weight is whether there are terms agreed to between the

¹⁵ *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) paras [13] to [15]

¹⁶ *Molusi v Voges NO and Others* 2016 (3) SA 370 at [28].

¹⁷ *Minister of Defence and Military Veterans and Another v Kume and others* 2024 JDR 0457 (GP).

parties that bring about the settlement of the disputes between the parties with sufficient clarity.¹⁸

[19] The essential features of the undertaking undoubtedly recorded that the parties demonstrated a willingness to be flexible and compromise on specific aspects of their original agreement. Put another way, they each addressed their underlying concerns, which led to the dispute in the first place, and they found a middle ground and accommodated each other's needs.¹⁹

[20] Significantly, in this case, the agreement struck explicitly provided that it may be made an order of court. Moreover, the undertaking compromised the applicant's underlying action, rendering it *res judicata*. It matters less what the agreement's heading was as the lower court was enjoined to consider the substance of the settlement agreement.²⁰

[21] Issue estoppel applies where an issue of fact or law is essential to a prior final judgment. Our courts have recognized that a strict application of issue estoppel could result in unfairness in some unusual circumstances. However, this is typically applied in cases where the nature of the issue is in dispute or at least open to some doubt. The nature of the issue was never in any doubt in this case. The court *a quo* itself could raise no issue with the undertaking. After all, the undertaking was made an order of the court. Some very recent jurisprudence has fortified our views on this connection.²¹

[22] Issue estoppel developed precisely because requiring sameness between the two causes of action allows parties to re-litigate the same issue by garbing these up in different causes of action. The authority not to apply issue estoppel for reasons of justice and equity must be evaluated regarding the *Henderson* principle. This principle provides that when a given matter becomes a subject of litigation, the following basic principles find application, namely:²²

‘...the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties

¹⁸ One of the crucial issues would be if the parties have agreed to a compromise.

¹⁹ The parties also preserved their relationship going forward.

²⁰ The court must determine whether the parties have, in substance, settled the dispute between them.

²¹ *Standard Bank of South Africa Limited v Swartz and Others* (Case no 1175 /2022) [2024] ZASCA 28 (22 March 2024)

²² *Henderson v Henderson* (1843) 3 Hare 100 at 114-115, [1843-1860] All ER Rep 378 at 381-2.

to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in the contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case...'

[23] This doctrine has been fully assimilated into our law. By entering into the undertaking and allowing it to have an order made by the court, the respondent euthanized his case in connection with the issue of his challenge to the terms of the undertaking.²³

[24] The focus of emphasizing substance over form in a legal argument is prioritizing a case's essential elements and underlying principles rather than getting caught up in technicalities or procedural requirements. It involves giving more weight to the argument's substance, merits, and fairness rather than strictly adhering to formalities or superficial aspects of the law. Emphasizing substance over form aims to achieve a just and equitable outcome. It recognizes that the purpose of the law is to serve justice and protect the rights of individuals rather than becoming overly rigid and procedural.²⁴

[25] This approach allows for a more comprehensive analysis of a legal dispute's facts, principles, and consequences, ultimately leading to a more fair and equitable resolution. In our view, there existed a dearth of evidence supporting the respondent's argument that he did not compromise and settle his dispute with the applicant in the form of the undertaking.²⁵

Costs

[26] This species of judgment application remedy is to simplify matters if the required conditions are met. The costs must follow the outcome because the respondent had no shields against the judgment application. What remains is the scale of the costs to be levied against the respondent. It must be so that the applicant can no longer rely on the terms of the lease agreement, which contained an attorney and client scale of costs provision. This is so because the initial cause of action has now fallen away and been overtaken by the agreed terms and conditions

²³ This must be so also for the issue of the finality of the extant litigation.

²⁴ The fact that the words 'settlement' agreement were omitted from the undertaking was completely irrelevant.

²⁵ The terms of the agreed undertaking were clear and unambiguous.

set out in the undertaking. However, the undertaking signed by the respondent specifically recorded an agreed provision that should the respondent breach the terms of the undertaking, he would be liable for the costs on the attorney and client scale.²⁶

Order

[27] We are not persuaded that the undertaking provides for the immediate eviction of the respondent and an automatic rent interdict on the papers as they present. Instead, it records a right afforded to the applicant to obtain vacant possession of the premises. The undertaking does not reference an automatic rent interdict. For all these reasons, the appeal is upheld, and the order in the lower court is set aside and replaced with the following order.

1. *The application in terms of Rule 27(9) is granted.*
2. *Judgment is granted in favour of the applicant against the respondent for payment as follows:*
 - 2.1 *R101 051.80 being the balance due in respect of arrear rental as of February 2021; and*
 - 2.2 *R275 404.79 for rentals between March 2021 until and including January 2023.*
3. *Payment of interest on the total outstanding amounts referred to above is calculated at 1% above the prime rate of Investec Bank Limited from time to time, calculated from 1 December 2022 until the date of final payment, both days inclusive.*
4. *Cancellation of the lease agreement between the parties is confirmed.*
5. *The respondent will pay the costs of this application, including counsel costs, on the scale between the attorney and client, as taxed or agreed.*

²⁶ Clause 2.6 of the undertaking.

WILLE, J

I agree:

THULARE, J